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In The

Supreme Court of the United States

October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

THE COURT OF APPEALS WAS INCORRECT IN APPLYING THE CLEARLY ERRONEOUS STANDARD OF REVIEW TO THE DISTRICT COURT'S RULING REGARDING REASONABLE SUSPICION AND PROBABLE CAUSE.

A. No matter how fact-intensive, all warrantless Fourth Amendment cases should be reviewed *de novo*.

Amicus counsel[1] correctly notes that under either standard, the expenditure of effort by the reviewing tribunal, in considering warrantless Fourth Amendment claims, will remain essentially the same. Amicus brief, at 11. The sole difference resulting from a *de novo* review, as opposed to one conducted under the clearly erroneous standard, is the degree of deference which is accorded the lower court. Accordingly, the conservation of judicial resources cannot be deemed an adequate justification for requiring one standard, over and above the other.

Amicus argues that because historical facts and questions of law are somewhat difficult to clearly distinguish, they should be reviewed with deference to the judicial officer who is " . . . better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104 at 114 (1985). Since the trial court is, according to the claim of amicus counsel, closest to the facts themselves, the reviewing court should defer to the judgment below.

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[1] All references to "amicus" refer to the independent amicus, Peter D. Isakoff.

The fundamental error in counsel's argument is the premise that the trial court is somehow better positioned to apply the law to the facts.

Petitioners maintain that reviewing tribunals have two main objectives in performing their duties; to correct errors and to develop the law. It is well recognized that federal appeals courts are, by their very nature, better positioned to consider, analyze, and apply developing legal principles. Trial courts are hampered with their crowded calendars which often preclude protracted and exhaustive research of legal issues. Such courts are not permitted, by virtue of the practical limitations of their ever increasing caseloads, to explore at length the complexities presented in Fourth Amendment issues. Courts of appeal routinely engage in a more protracted and reflective analysis of the legal underpinnings of Fourth Amendment issues. Additionally, as was stated earlier, an appellate tribunal is ever mindful of its obligation to develop the law. It is the trial court's responsibility to conduct a fair airing of the facts in order that it may determine whether an established right has been abrogated. It cannot therefor be said that a trial court is better positioned to decide mixed questions of fact and law.

Amicus, at 14, cites this Court's decisions as foundation for the proposition that, "Where no statute or rule expressly governs the matter," the determining factor should be to examine the characteristics of the question under review and the institutional advantage of a federal trial and appellate court in deciding it. *Salve Regina College v. Russell*, 499 U.S. 225, at 231-239 (1991); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 686-87 (1989); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-288

(1982). In short, it is premised that where the issue is fact dependent or fact laden, the mixed question of fact and law which results should be reviewed with the deference permitted under the clearly erroneous standard.

The petitioners maintain that mixed questions of fact and law have three component parts; historical findings of fact, the principle of law to be applied to the factual underpinnings, and the placement or structuring of the facts within the legal framework. Unquestionably, findings of historical facts are reviewed under the clearly erroneous standard.[2] Whether the correct legal principle was utilized is reviewed *de novo*. Petitioners argue that with regard to issues concerning reasonable suspicion to stop and probable cause to search, the actual utilization of the legal principle within the context of the historical facts must be reviewed *de novo*.

By their very nature, in every suppression issue, whether a challenge to the admissibility of a statement, to physical evidence, or to an identification, the circumstances giving rise to the challenged evidence are of crucial import. Each of the suppression issues described herein are fact intensive because they arise from circumstances in which a citizen has been searched, has been interrogated, has been placed in custody, or has been identified as the perpetrator of a criminal offense. It cannot be said therefore, that the application of the

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[2] Petitioners have always conceded that the judicial officer below is in a better position to decide historical facts. As such, findings of fact and only findings of fact should be reviewed through utilization of the clearly erroneous standard.

appropriate reviewing standard turns on the quantum or intensity of historical facts.

This Court has continuously reviewed *de novo* suppression issues based in different constitutional contexts other than that at bar. *Davis v. North Carolina*, 384 U.S. 737 (1966) (voluntariness of confession); *Sumner v. Mata*, 455 U.S. 591 (1982) (pretrial identification); *Brewer v. Williams*, 430 U.S. 387 (1977) (waiver of Sixth Amendment right to counsel). This Court has never opined that the application of the *de novo* standard is determined by the quantum of facts at issue. Accordingly, there can be no justification for this Court to deviate in warrantless Fourth Amendment cases from the recognized *de novo* review standard which has been heretofore applied to non-Fourth Amendment suppression issues.

Amicus counsel posits that a warrantless Fourth Amendment determination is non-technical and therefore better suited to an "application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case," citing *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960). Amicus Brief at 15. In *Duberstein*, a civil and non-constitutional framed action, the Court determined that because the statutory standard which is to be applied to the factual scenario was "non-technical in nature", the results are reviewed under the clearly erroneous standard. The Fourth Amendment enshrines a multitude of principles which are subject to constant metamorphosis and analysis of competing values and policies. The application of these sophisticated developing principles to a given fact situation is not the simple task described in

Duberstein. Similarly, this process requires a careful and in-depth examination of the fundamental concepts, together with the subtle nuances which have been created by the precedents announced in this Court. A trial court does not engage in an exercise which results in the application of an unerringly static principle to case specific facts. Rather, the application of Fourth Amendment law to a fact situation requires consideration of how the principle developed, in what direction the principle is heading, and by what means it is likely to evolve. The trial court does not merely slap a legal label on the factual model.

It is premised by opposition counsel that *de novo* review should be employed for those questions which will "produce a decision of precedential significance." Amicus brief at 16. Warrantless Fourth Amendment cases, it is urged, are focused on the specific facts and circumstances which surround the search and seizure. Those issues, amicus suggests at 16, "utterly resist generalization." Therefore, it is argued, that questions arising from such case specific facts should be left to the determination of the district court with deferential review on appeal. Warrantless Fourth Amendment cases, according to amicus counsel, will not serve to establish clear guidelines for lower courts, nor will they clarify underlying principles of law. Such determinations, "would very likely contribute only negligibly to the accuracy . . . at a huge cost in diversion of judicial resources". Amicus brief at 17, citing *Anderson v. Bessemer City*, 470 U.S. 564 at 575 (1985). Amicus counsel suggests that "*de novo* review by the Court of Appeals in this case could produce little of real precedential value, at least now that decades of

intense Fourth Amendment litigation have settled the basic principles of probable cause determination." Amicus brief at 22. It is with these propositions that petitioners wholly disagree.

Fourth Amendment law has, to the contrary, been evolving through the decisions announced in this Court, the rulings of lower appellate tribunals, and through the analysis of recognized legal scholars. The Fourth Amendment provides only the framework within which many principles of application have developed. Some of the concepts which have emanated from the Fourth Amendment have gradually eroded with the passage of time. Some have slowly evolved and some wax and wane as societal interests and values change.

The evolution of Fourth Amendment jurisprudence is often in response to technological changes in law enforcement. Thirty five years ago the Court considered whether Fourth Amendment rights were violated when evidence was obtained through sophisticated electronic eavesdropping. *Silberman v. United States*, 365 U.S. 505 (1961). Ten years ago this Court addressed whether the EPA could use aerial photography to enforce environmental laws. *Dow Chemical Corporation v. United States*, 476 U.S. 227 (1986). More recently, this Court faced the issue whether a helicopter hovering 400 feet over a residence in an attempt to spot marijuana growing in the greenhouse was a search within the meaning of the Fourth Amendment. *Florida v. Riley*, 488 U.S. 445 (1989). It should be assumed that appellate courts will soon be asked to consider Fourth Amendment claims arising in the context of the Internet, DNA and gene harvesting seizures. While one specific Fourth Amendment case is clearly of most import

to the individual litigants, the evolution of Fourth Amendment law takes place incrementally with varying facts in common situations which present on a daily basis.

The Fourth Amendment must remain flexible. So too, must appellate courts have the independence to exercise *de novo* review concerning decisions of lower courts which arise within the context of technological changes.

B. All Fourth Amendment cases have precedential value.

The amicus suggests that because Fourth Amendment principles derive from fact dependent determinations, precedential significance is diminished and appellate courts should not devote their resources which *de novo* review would require. Amicus brief at 17-21. A similar argument was recently rejected in *Thompson v. Keohane*, 116 S.Ct. 457 (1995) in the Fifth Amendment context. There, this Court recently rejected the argument that the "in-custody" determination should be accorded a presumption of correctness under 28 U.S.C. § 2254(d). In so doing, the majority could not agree with the dissent's argument that the trial court was in a better position to "decide the relatively straightforward and fact-laden question of *Miranda* custody." Justice Thomas and Chief Justice Rehnquist dissent at 468. The dissent argued that such custody inquiries often require the trial court to make any number of "fact-intensive, close calls" which often involve assessments of credibility and demeanor. Further, the trial court "must consider a complex of diverse and case-specific factors" to understand the position

of the defendant at the time of interrogation. Dissent at 468.

The *Keohane* court stated that there were two lines of cases. In the first line it agreed that there are instances where the trial court is called upon to make determinations concerning primary or historic facts which "depends heavily on the trial court's appraisal of witness credibility and demeanor." *Keohane*, at 465. The majority reasoned that even in those instances where an objective legal standard was employed, as in determining juror bias, the "predominate function . . . involves credibility findings whose basis cannot be easily discerned from an appellate record." In such cases the trial court is better positioned to make the legal conclusion, and the judgment of the "jurist-observer" is accorded presumptive weight. *Id.* at 465. The resolution of the issue in the first line of cases often has little precedential value. Whether a particular juror is biased, or a particular defendant is competent does not easily lend itself to general rule making.

The second line of cases, as typified in *Keohane*, involves often fact-intensive scenarios, which may or may not involve credibility issues. The trial court, however, is not called upon to make credibility determinations concerning events which occurred in the courtroom, nor is the trial court in a uniquely superior position concerning knowledge of local practices, as in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

In this second line of cases the trial court makes the determinations of historical fact, resolves credibility issues if they arise, and then applies an objective test to

resolve the ultimate inquiry. "This ultimate determination, we hold, presents a mixed question of law and fact qualifying for independent review." *Keohane*, at 465. In resolution of the issue in *Keohane*, the court noted "[j]udges alone make the 'in custody' assessments for *Miranda* purposes, and they do so with a view to identifying recurrent patterns, and advancing uniform outcomes. If they cannot supply a definite rule, they nonetheless can reduce the area of uncertainty." *Keohane*, n. 13.

In this second line of cases the resolution of the issue has precedential value. The resolution of fact-intensive issues concerning reasonable suspicion to stop and probable cause to search, just as the "in custody" issue in *Keohane*, are not dependent upon a jurist-observer's superior position to make credibility determinations concerning events which occur in the courtroom. The events of the stop and search, like the retelling of the events of the custodial interrogation, often occurred weeks or months prior to the evidentiary hearing. Although there may be credibility questions to resolve, once the trial court makes those determinations, it applies an objective legal standard, considering the totality of the circumstances, and arrives at a "uniquely legal" determination. *Keohane* at 465.

As will be discussed below, the development of Fourth Amendment jurisprudence arises from the application of varying fact situations to an objective legal test and to precedentially developed principles.

Amicus counsel suggests that *Illinois v. Gates*, 462 U.S. 213 (1983) represents a withdrawal from concrete

and specific guidelines in favor of a "totality of the circumstances" approach. Such standard, it is maintained, is consistent with the more deferential clearly erroneous test. Brief at 20-21. But, as this Court noted in *Thompson v. Keohane*, n. 11, the "totality of the circumstances cast of the 'in custody' determination, contrary to respondent's suggestions, does not mean deferential review is in order."

Amicus counsel at 20, notes dicta from *Gates* at n. 11 that there are "so many variables in the probable cause equation that one determination will seldom be useful 'precedent' for another". The context of this dicta was whether or not the allegations submitted to the Magistrate in *Spinelli v. United States*, 393 U.S. 410 (1969), under the totality of the circumstances test, would support a present finding of probable cause. The court declined to speculate, deeming the result to be of little precedential value.

The amicus brief, at 20-21, states that "most probable cause and reasonable suspicion decisions involve 'multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce v. Underwood*, 487 U.S. 552 at 562 (1988). *Pierce* was not a Fourth Amendment case but was concerned with whether the Secretary was substantially justified within the meaning of the Equal Access to Justice Act, 28 U.S.C. § 2412 (d).

The *Pierce* Court stated that where the question of the appropriate standard of appellate review is not answered by statutory command, "the answer is provided by a long history of appellate practice." As petitioners have noted above, the long history of appellate practice mandates

continued use of the *de novo* standard in warrantless Fourth Amendment issues.

Contrary to the argument of amicus counsel, trial courts do indeed preside over warrantless Fourth Amendment suppression matters which contribute to the development of the law. These decisions result in a compendium of fact situations which, over the passage of time, will reflect changes, evolution and retrenchment from previous applications. Deference to the trial court, as a legal construct, would inhibit both the development of the law and the error correcting function of the intermediary appellate courts.

Amicus argues that because the factual variables are infinite, "Attempts to draw bright lines would be futile." Brief at 22. If this were true, various Attorneys General and local District Attorneys would not write detailed newsletters to law enforcement agencies involving Fourth Amendment issues. If search and seizure law was without precedential value, Wayne LaFave and others would not write volumes on this aspect of Fourth Amendment jurisprudence. Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment, Third Ed.*, (1966). Further, this Court and lower courts would not have published thousands of decisions concerning search and seizure issues. As this Court recognizes, the brighter the line, the easier it will be for law enforcement agencies to anticipate Fourth Amendment problems and respond appropriately. It is the development of this body of Fourth Amendment law which prevents arbitrary and ad hoc enforcement.

C. *De novo* review furthers the appellate objective of error correcting.

The clearly erroneous/*de novo* review dichotomy, in its practical application, creates an anomaly which is in conflict with the overall appellate objective of correcting errors. If an appellate court were to conduct a review and disagree with the conclusions of law of the trial court, it would be free to reverse under the *de novo* standard. If the same appellate tribunal were to review the same conclusions, by the clearly erroneous standard, it would affirm unless the decision was "clearly erroneous". "When the clearly erroneous standard applies, the reviewing court may not reverse the trial court 'simply because it is convinced that it would have decided the case differently.' " *United States v. Gypsum Company*, 333 U.S. 364 (1948). Thus, a reviewing court which disagrees with the trial court's legal conclusion will find its hands tied and will be required to affirm the finding below. Very little guidance has been given by this Court, other than in *Anderson v. Bessemer City*, in defining what errors are clear enough to justify reversal.[3] *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

It is certainly reasonable to anticipate that appellate courts will differ in their assessment of when the clearly erroneous standard has been satisfied. Two appellate courts, in construing similar fact-law determinations could come to diametrically opposed results; one requiring reversal and the

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[3] " 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

other supporting affirmance. Clearly such inconsistency can hardly be said to further the policy of advancing uniform outcomes and promoting the error correcting function of a reviewing court. Additionally, such an anomaly is an impediment to the second overall objective of appellate tribunals; to develop the law. Courts of appeal must maintain autonomy in application of their legal principles in order to further these objectives.

Amicus counsel, in urging this Court to adopt a clearly erroneous standard for review of warrantless Fourth Amendment issues, inferentially suggests that the Fourth Amendment should not be accorded the same status as other constitutionally enshrouded issues. In First Amendment cases the Court has historically conducted fully independent review, *Harte-Hanks* and *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). Except in cases involving issues of limited precedential value, such as individual juror bias, the Court has consistently accorded *de novo* review to issues which arise as a result of either Fifth or Sixth Amendment challenges. See, *Thompson v. Keohane*, *Davis v. North Carolina*, 384 U.S. 737 (1966). Amicus counsel states no recognized proposition for differentiating Fourth Amendment based issues from those whose origins are founded in other constitutional rights.

D. *De novo* review of warrantless Fourth Amendment cases is required to avoid inconsistent results on appeal.

Amicus counsel's insistence that the clearly erroneous standard for appellate review of probable cause decisions would not denigrate the warrant requirement is

insupportable. Petitioners maintain that the clearly erroneous standard ignores the fundamental precept of *Gates*, to encourage reliance by police officers on use of a warrant. The Court announced in *Gates* that its new substantial basis test, to be utilized in assessing the magistrate's determination of probable cause, was premised upon a practical objective. The Court anticipated that if deference was accorded the magistrate's probable cause finding, police officers would thereby rely upon the implicit security from such deference, and obtain warrants. To accord similar appellate deference in warrantless reviews would announce to law enforcement officials that there is no added benefit in obtaining a warrant. They can, therefore, pursue warrantless searches with the same level of comfort as for those seizures conducted with a warrant.

It is interesting to note that while the *Gates* Court announced the substantial basis standard of review, for the issuance of a warrant, other sub-issues which emanate from the warrant's execution have been reviewed *de novo*; i.e. whether exclusion is mandated where an officer exercises good faith in reliance upon the warrant, *United States v. Leon*, 468 U. S. 897 (1984); and whether the police exercised good faith in their investigation concerning the warrant application, their duty to fully disclose to the magistrate what information they possessed, and the reasonableness of the manner of its execution, *Maryland v. Garrison*, 480 U.S. 79 (1987).

It is argued that to require *de novo* review for probable cause and reasonable suspicion determinations would create incongruous results. Counsel claims that *Jackson v.*

Virginia, 443 U.S. 307 (1979) is supportive of the proposition that appellate review of the sufficiency of the evidence for criminal convictions is clearly erroneous. Amicus brief, at 32. Therefore, to require the stricter *de novo* standard for Fourth Amendment issues is illogical. Counsel's analysis of *Jackson* is incorrect. Reviews of sufficiency of the evidence require a consideration of the facts below and whether any rational trier of fact could find guilt beyond a reasonable doubt. Such a review does not address or take into account pretrial determinations of admissibility of evidence for which there has been a claimed constitutional violation. Once a criminal action has been submitted to the trier of fact, pretrial determinations have been made outside of the presence of the jury.

Of further import to petitioners' challenge to counsel's analysis of *Jackson*, is the fact that the standard of review for a judgement of conviction is wholly different and completely distinguishable from the clearly erroneous standard. The *Jackson* court announced that the appropriate standard for sufficiency of evidence is whether upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. The clearly erroneous standard is not whether there is no trier of fact who could have made the same legal conclusion as the tribunal below. A comparison of the standard for appellate review of federal criminal convictions to the clearly erroneous standard is simply mixing apples and oranges.

Amicus counsel further argues that an inconsistency results from the juxtaposition of the *Gates* substantial basis test for warrant reviews and the *de novo* standard for warrantless issues. In theory, the review of a warrant

probable cause determination made by a magistrate, without a full adversary hearing, would require more deference than that accorded legal conclusions drawn by the trier of fact after a full-blown testimonial hearing. Counsel correctly surmises that such variance, while seemingly incongruous, is in fact, "an unavoidable by product of a desire to encourage warrants." Amicus brief, at 31.

The last claimed inconsistency which would emanate from application of *de novo* review to warrantless Fourth Amendment issues arises from consideration of *Stone v. Powell*, 428 U.S. 465 (1976). The *Powell* court determined that in those matters where there has been a full and fair opportunity to litigate suppression issues in the state court, the remedy of federal habeas would be foreclosed. The habeas limitation announced in *Stone v. Powell* was founded exclusively in a policy decision emanating from a consideration of the exclusionary rule. The *Powell* decision holds only that the limited contribution to the exclusionary rule permitting collateral review of Fourth Amendment claims is outweighed by the substantial societal costs. *Powell*, at 494-495.

Counsel suggests that this Court should not distinguish between habeas review of state suppression issues and those considered through direct federal appeal. The proscription announced in *Stone v. Powell* is conditioned upon a full and fair consideration of a defendant's Fourth Amendment claims at the state level. Petitioners maintain that such full and fair litigation includes complete appellate review. This Court agreed with such proposition in its decision in *Powell*; "the force of this justification [preserving the integrity of the judicial process] becomes

minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review." *Stone v. Powell*, at 486.

A federal litigant, in order to be accorded full and fair litigation must, similarly, be permitted access to meaningful, fair and complete appellate review. Opposing counsel erroneously equates the *Powell* Fourth Amendment habeas prohibition with the deference required by the clearly erroneous standard. If this Court is to be consistent in its application of appellate and Fourth Amendment rights, and mindful of the policy limitations which it has carved out to the exclusionary rule, federal appeal litigants must have their Fourth Amendment claims reviewed *de novo*.

CONCLUSION

Petitioners maintain that *de novo* review should be granted in all warrantless Fourth Amendment cases. To do so will maintain continuity in the development of the law, will further the appellate objective of error correcting, and will prevent inconsistent results on appeal. The judgment of conviction should be reversed and the matter remanded.

Respectfully submitted,

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